IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-849

PERRY RUSSELL TUNNELL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, PERRY RUSSELL TUNNELL, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit. On this Motion for Rehearing, Petitioner brings forward two specific points: (1) PERRY RUSSELL TUNNELL was denied a fair and impartial jury; and (2) "Willfulness" is lacking as a matter of law in the case at Bar when the "Bishop test" is applied to the Fifth Circuit Opinion.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered October 1, 1973; and a Petition

for Certiorari was filed within thirty (30) days of such date. The denial of the Petition for Writ of Certiorari was made by Order entered by the Honorable Supreme Court of the United States on February 25, 1974; and this Petition for Rehearing has been filed within twenty-five (25) days from such date. This jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Title 28 U.S.C. 2403 is also applicable.

QUESTION NO. 1 RESTATED

PERRY RUSSELL TUNNELL WAS DENIED A FAIR AND IMPARTIAL JURY.

Argument and Authorities under Question No. 1

An involved dissertation into additional rhetoric on the points heretofore raised by our Petition for Writ of Certiorari will not be presented in this Petition for Rehearing. However, because the facts of the controversy surrounding this tax evasion case are of a substantial nature involving millions of taxpayers in the United States and because of the intervening decision by the Fifth Circuit Court of Appeals on a case similar to the case at Bar, together with Counsel's sincere belief that asking prospective jurors whether they are under indictment violates each Defendant's rights to due process and a fair and impartial jury in criminal prosecution, we feel that substantial grounds of utmost sions from the same Fifth Circuit to which Petition for Writ of Certiorari is requested, have occurred since the decision has been rendered by this Court not to grant certiorari. We sincerely hope that this short

memorandum will aid and assist the Court in altering the previous ruling and in the exercise of judicial discretion, grant Petitioner's Writ.

In the recent case of *Ham vs. South Carolina*, 93 Sup. Ct. 848, questions refused by the Trial Judge at time of voir dire examination of the jury were determined to be error. The landmark decision on which this issue was based is the old case of *Aldridge vs. United States*, 283 U.S. 308, 51 Sup. Ct. 470, 75 L.Ed. 1054 (1931). Our issue, though different in substance, has exactly the same effect.

The asking of prospective jurors if they are under indictment as a fundamental disqualification from jury service is prejudicial to an accused who is under indictment. This is a judgment call that the conscience of the Supreme Court of the United States must decide, but the matter has been preserved by motions to the Court prior to the asking of the question — and a motion to quash the panel after the question was asked. It is respectfully asserted that the asking of this question based upon statutory demands is unconstitutional, but at the very least the defendant has been denied due process because of the voir dire examination and has not received a fair and impartial jury.

QUESTION NO. 2 RESTATED

"WILLFULNESS" IS LACKING AS A MATTER OF LAW IN THE CASE AT BAR WHEN THE "BISHOP TEST" IS APPLIED TO THE FIFTH CIRCUIT OPINION.

Argument and Authorities under Question No. 2

This Honorable Supreme Court set forth in *United States vs. Bishop*, 93 Sup. Ct. 2008 (1973) the express holding that there was no distinction between the definition of the term "willful" in the misdemeanor statutes and in the felony statutes. At Page 2015 of that opinion, the following statement is quoted:

> "The same analysis was applied to the requested lesser-included-offense instructions for Section 7203 Id., at Page 352, 75 Sup. Ct. 1010. The clear implication of the decision in *Sansone* in that the word 'willfully' possessed the same meanings in Sections 7201, 7203 and 7207. *Sansone* thus foreclosed the argument that the word 'willfully' was to be given one meaning in the tax felony statutes and another meaning in the tax misdemeanor statutes."

Perhaps Judge Ely, the Circuit Judge for the Ninth Circuit in *United States vs. Andros*, 484 F. 2d 531 (1973) set forth in his opinion one of the items that has been missing in the TUNNELL case from its inception and which has been argued to both the Trial Judge in Motions for Judgments of Acquittal, to the Appellate Court of Appeals and to this Honorable Supreme Court in that the one element missing was the "willfulness" of Defendant, RUSSELL TUNNELL, in this case. The Government did not show any evidence of Mr. TUNNELL's financial circumstances so that he would be in a position to pay the tax asserted by the Government to be owing, even if the Government's net worth prose-

cution method is to be accepted. Even in a 7203 misdemeanor, "failure to pay" case, ability to pay tax is necessary element. The Fifth Circuit Opinion ignores this fact.

Using the TUNNELL Opinion itself, as found on Page 152 of 481 F. 2d, the Fifth Circuit runs out of reasons for finding the willful intent and motive necessary to convict Mr. TUNNELL. At the bottom of the first column and the top of the second column, they find and cite good law stating that an evil motive is required and an affirmative act is necessary. Then it is judicially declared that $829.43 is a large amount of income tax; they rely upon a conclusion by the Revenue Agent, objected to by Defendant, that "inadequate records were kept by the taxpayer"; and then allow an inference to be created on willfulness "*sufficient*" to create a jury question.

If this were not weak enough on the evil motive requirement, the "affirmative" act necessary then is inferred from the returns themselves. In any tax controversy, there is a discrepancy between the returns as filed and the Government's figures. If this discrepancy can be now used as the "affirmative act necessary to commit criminal tax evasion", there is not a safe individual in the United States who has once subscribed his name to a 1040 Tax Form. 26 U.S.C. 7203 and 7207 misdemeanor offenses cannot be fused together under the "Bishop test" to create a felony offense under 7201. This is the error made by the Fifth Circuit.

As this Honorable Court set forth in Bishop at Page 2017, "this long-standing interpretation of the purpose of the reoccurring word 'willfully' promotes coherence in the group of tax crimes." In our complex tax system, uncertainty often arises, even among taxpayers who earnestly wish to follow the law. The Court has said:

> "It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." Spies 317 U.S. at Page 496, 63 Sup. Ct. at Page 367. "Degrees of negligence give rise in the tax system to civil penalties. The requirement of an offense committed 'willfully' is not met, therefore, if a taxpayer has relied in good faith on a prior decision of this Court. Authorities cited. The Court's consistent interpretation of the word 'willfully' to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well meaning but easily confused mass of taxpayers."

It is respectfully asserted that Mr. TUNNELL is going to serve four (4) years in prison because of this play on words between the various Circuit Courts and this Honorable Supreme Court.

The Motions for Judgments of Acquittal made at the close of the Government's case, made at the close of the case in Chief and made after the Jury verdict

should have been granted by the Trial Court, should have been reversed and rendered by the Fifth Circuit Court of Appeals; and it is now respectfully asserted that this Motion for Rehearing on Petition for Certiorari should be granted because of the inconclusive proof of this important and carefully characterized "willful" tax crime set forth by this Honorable Court in *United States vs. Bishop.* If *Bishop* is the yardstick on willfull intent, a Judgment of Acquittal should have been entered in this case. A careful reading of the TUNNELL case compared with the test set forth in *Bishop* will substantiate that the TUNNELL case simply does not measure up.

It rarely appears that one can look to the Supreme Court and say "I told you so"; but realistically speaking, the admonishment made in our presentation of seeking a Writ of Certiorari, "the flood gates will be open by the TUNNELL Opinion being affirmed", has been substantiated in the classification by the National Reporter Systems. A denial of this Motion for Rehearing will add to the ever increasing number of decisions destroying the accused's presumption of innocence and placing in its stead, the statements set forth by the Fifth Circuit Court of Appeals when they *presumed* $142.08 was understating a large amount of tax; *presumed* that evidence of *poor* record keeping was evidence of *inadequate* records permitting the *inference* of willfulness; and allowed that to create a jury question or an inference; and from that *inference* used it as a springboard to have the tax returns now *inferred*

to be "false" to be the necessary *"affirmative act."* NO ONE CAN DEFEAT NOR DEFEND AN ALLEGATION AGAINST HIM IF ALL OF THESE PRESUMPTIONS CAN BE INDULGED IN BY THE PROSECUTION IN A NET WORTH CASE, WHICH IS ITSELF ONLY AN APPROXIMATION.

How can this Court allow all of this circumstantial evil motive and bad intent to meet the Bishop test when the agent testified to direct evidence of his good intent, cooperation and willingness to supply records. (Trans. pp. 632, 655, 731, 734, 742, and 764.)

Another conflict in the case seems so apparent when one looks at *United States vs. Calles*, 482 F. 2d. 1155 (1973), decided shortly after TUNNELL's case here at Bar. We find the Fifth Circuit contradicting itself on one of the very points raised in the Fifth Circuit and also on our Petition for Writ of Certiorari. The Fifth Circuit held that the pre-prosecution years tax returns of 1962, 1963 and 1964 were admissible in the TUNNELL case. The Fifth Circuit held Appellant could not introduce his income in 1968, a pre-prosecution year, and said it was irrelevant to prove his net worth at the close of that year. These holdings are inconsistent and incorrect and we implore this Court to the benefit of all the millions of taxpayers in the United States that are subjected to potential criminal prosecu-

tion *here sanctioned,* to grant certiorari and set forth definitive guidelines for a net worth prosecution case.

Respectfully Submitted,

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Jerry Bain

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Petition for Rehearing on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed, postage prepaid, air mail, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and three (3) true and correct copies of same to Mr. Roby Hadden, United States Attorney, Federal Building, Tyler, Texas 75701, postage prepaid, this the 19 day of March, A.D. 1974.

Jerry Bain

CERTIFICATE OF COUNSEL IN ACCORDANCE WITH RULE 58 (2)

Now comes JERRY BAIN, Counsel of Record for Petitioner, PERRY RUSSELL TUNNELL, Defendant-Appellant, on this Petition for Rehearing on Appellant's Petition for Writ of Certiorari and respectfully states to the Honorable Supreme Court of the United States that this Petition for Rehearing is presented in good faith and not for delay; the Petition for Rehearing is restricted to grounds specifically set forth in Rule 58(2) of the Supreme Court Rules.

JERRY BAIN